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CITATIONS

403971—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 12

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

The carrier appellees assert that appellant is requesting this Court "to re-examine the record and to review the evidence and to determine issues of fact * * *" (R. R. Br., p. 19). The Commission's brief, on the other hand, emphasizes that appellant has made no general challenge to the findings or to their evidentiary basis (Br., p. 17). The latter statement is correct. It is our position that certain essential facts which are plainly established and not subject to dispute show that there has been unjust discrimination. We argue that the findings and the reasoning of the Commission do not support its conclusion that the carriers have a rational basis for absorbing the cost of

wharfage and handling in respect to commercial freight moved over the Army Base piers, while retaining the equal rates collected on military freight moved over those same piers without making any contribution to the cost of wharfage and handling.

We shall attempt to restate and clarify what we conceive to be the essential facts and issues, addressing ourselves particularly to the points of difference which appear from the opposing briefs.

We add one further preliminary comment. We are obliged to call to the Court's attention that the section of the carriers' brief entitled "Findings and Conclusions of the Commission" (pp. 10–13) is not in any sense confined to a summary of the Commission's findings and conclusions. It contains in very substantial measure summaries, descriptions, and interpretations of selected portions of the testimony and, in no little degree, the arguments of carrier counsel. In many instances, the testimony to which reference is made in this section of the carriers' brief is not reflected in any Commission finding.

1. THE FREIGHT RATES COVER WHARFAGE AND HANDLING

We agree with appellees (see R. R. Br., p. 4; Commission Br., p. 13) that there is ordinarily no obligation on the part of carriers to unload carload freight (handling) or to provide piers for the accomplishment of interchange between rail and water carriers (wharfage). The provision of such service and facilities is the essential business of a marine terminal operator. Indeed, in Norfolk, most of the piers and pier services are provided by terminal companies

rather than by railroads (R. 19). When a railroad undertakes to provide such services at a port, it is reaching out and assuming an obligation not imposed by law.

The instant controversy arises against this background: Appellee carriers have undertaken to provide pier services and have made this offering on what amounts to a tie-in basis. The shipper who pays the export rates published in the carriers' tariffs becomes entitled, provided he meets certain stated conditions, to wharfage and handling.[1] The rule of the Pennsylvania Railroad (which the Commission describes as "typical" (R. 16)) relating to wharfage and handling charges states that such charges, subject to certain exceptions and limitations, "*will be included in the freight rate* to or from Norfolk, Va., on export, import, intercoastal and coastwise freight

[1] There is some point made in appellees' briefs of the fact that the export rates are not published in the same tariff items in which the carriers set forth the port services to which the export shipper is entitled (Commission Br. pp. 15, 18–19; R. R. Br., p. 20). We do not believe it can be deemed significant that the shipper, in order to learn what the railroad has undertaken to perform, must read several tariffs, or several items, or several rules, instead of one. Nor is it significant that inland carriers as well as the carriers serving the port city participate in the publication of export rates. The carrier appellees in this case have undertaken to absorb wharfage and handling charges at the port of Norfolk. And whether the freight rate which they receive is the entire rate paid by the shipper, as occurs when they are also originating carriers, or a division of such rate, the fact remains that they have received compensation covering both their line-haul and accessorial terminal services. They make no claim that the export rates, or their divisions thereof, are below a compensatory level.

traffic * * *" (R. 16, 458; emphasis added).[2] In other words, the shipper buys, as part of a package, a right to obtain certain terminal services without additional cost. As the same item of the Pennsylvania tariff goes on to show (R. 459), the carrier arranged to provide these services at the Army Base piers by hiring a terminal operator (Stevenson & Young, Inc.) to perform them at $1 per ton.

It is not true at all ports, or even on all traffic moving through the port of Norfolk, that the railroads offer terminal services only on a tie-in basis. Thus, on traffic moving to Norfolk from Southern territory, wharfage and handling costs are generally the subject of a separate charge (*i. e.*, a charge additional to the line-haul rate) which is collected only when the service is requested and performed. See the Commission report, R. 16. The purpose and effect of providing port services as part of a package are evident. If the shipper by paying the freight rate on export traffic to Norfolk thereby becomes entitled to port services at a certain designated place in the port, he will be effectively deterred, at least in ordinary circumstances, from seeking the services at some other pier or terminal. From the carrier's standpoint, this minimizes competition in the provision of terminal

[2] The amounts of wharfage and handling charges which the carrier will absorb are indicated by reference to the tariff of the Norfolk & Portsmouth Belt Line Railroad Company (R. 16, 458). (The Belt Line is a subsidiary of carriers serving Norfolk and operates exclusively within that city (see R. 242).) The Pennsylvania tariff also sets forth these same amounts in stating the compensation which it will pay to the Stevenson & Young terminal company for actually rendering the services (R. 459).

services (a business in which the carriers themselves are frequently engaged) and prevents a dispersion of traffic to numerous terminals (a factor which may well serve operating convenience).

As indicated in our opening brief (pp. 5, 25), the War Department, various port authorities, and others objected, some years ago, to the practice, then widely prevalent at North Atlantic ports, of providing port services without assessing a separate charge therefor, believing that its necessary tendency was to prevent free entry into the marine terminal business, and that the consequent demoralization of competition might well result in inadequate port facilities. See *Wharfage Charges at Atlantic and Gulf Ports,* 157 I. C. C. 663 (1929). A closely divided Commission concluded that there was no showing that the existing port facilities and services were inadequate, and held that the carriers would not be required to assess separate charges for port services.

Commissioner Eastman, who was one of five dissenters, pointed out that many accessorial services are "of a kind which is not necessarily associated with transportation service and which the carriers do not hold themselves out to furnish to the full measure of the public demand. In such instances like services must be, and are, provided by others, and the failure of the carriers to publish and apply separate charges subjects these others to an unfair and often demoralizing form of competition." 157 I. C. C. at 693. Addressing himself particularly to wharfage and handling, he stated (p. 697) that they are "manifestly special services which are not associated with

the normal transportation of carload freight." He continued (*ibid.*):

> * * * It is further the fact that much of the water-borne traffic is, and must necessarily be, handled over piers and wharves which are not owned by the carriers. If the owners of these piers and wharves are to receive any compensation at all for the services of wharfage and handling, where the railroads make no separate charges for such services, apparently they must depend upon such allowances, if any, as the carriers see fit to accord them.
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> * * * it seems to me upon present information that it would eliminate a considerable amount of discrimination, promote a healthier situation at the ports as between the railroad-owned piers and those owned by States, municipalities, and private parties, and simplify the regulation of the freight rates if separate wharfage and handling charges were required. As a matter of fact, there is nothing revolutionary about such separate charges, for, while they are not customary at the north Atlantic ports, they are frequently imposed, as the record shows, in other sections of the country.

The majority's ruling, however, permitted the perpetuation of single-factor rates, with the opportunity that they provide the carriers to reserve (either to themselves or to selected agents) the business of performing the accessorial terminal services.

The carrier appellees now seek to argue in the instant case that the freight rates do not really cover the wharfage and handling charges which they absorb on commercial freight handled at the Army Base piers

(R. R. Br., p. 20). Otherwise stated, they would avoid the conclusion that including the wharfage and handling charges in the freight rates—the very words of the tariffs, as noted above (p. 3)—is a tie-in arrangement. Thus their brief repeatedly describes the services as "free." But since there is no suggestion by any carrier (and no allegation, evidence or finding to support such a suggestion) that the export rates (or divisions thereof) which these carriers receive fail to compensate them for their full tariff undertakings and since it is perfectly clear that the revenues used by these carriers to compensate Stevenson & Young for providing the services on commercial freight can only come from the over-all freight rate (as, indeed, was stated by the Pennsylvania's General Freight Agent, R. 289), it is apparent that the services are only "free" in the Pickwickian sense that, having been paid for once, they need not be paid for again.[3] See our opening brief, pages 26–27.

[3] Appellee carriers state (R. R. Br., p. 25) that the Commission "held that the terminal services were not included in the export rates." At another point (*id.*, p. 20), counsel somewhat modify this and declare that the "Commission concluded that the export rates do not *automatically* include wharfage and handling services" (emphasis added). At no point does the Commission's report either find or hold that the export rates were not adequate to cover the terminal services. At no point does it either find or hold that the revenues obtained from these rates were not used to defray the $1 per ton paid to Stevenson & Young on commercial freight. The burden of the Commission's holding was simply that the restrictions upon the availability of the services which are imposed by the carriers' tariffs are reasonable.

The carriers also state (*id.*, p. 24) that export rates apply in instances when terminal services are not provided, and that it

It is also argued by appellees, in similar vein, that the export rates to Norfolk are reasonable; that they are reasonable even in respect of shipments on which accessorial services are not provided; and that there would be no downward adjustment of the rates if the carriers should completely refrain from absorbing wharfage and handling costs, because the decisive factor which fixes the level of the rates to Norfolk is the necessity of meeting competition from other ports. See R. R. Br., p. 20 *et seq.*; Commission Br. p. 18 *et seq.*; cf. R. 16. As made clear in our opening brief, we do not contend that the export rates are at an unreasonable level or that they would be above the zone of reasonableness if port services were wiped out across the board. It is enough for our purposes that the rates are compensatory and that others, paying those same rates, are receiving a benefit which is unreasonably and discriminatorily denied the Government. Whether there would be a change in the

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must follow "that the export rates are made without the inclusion of any factor for the terminal services and that such services are not paid for out of the export rates." This is, indeed, a classic *non sequitur*. That a service is not provided in all situations does not, of course, prove that the freight charge is inadequate to cover it when it is provided. The "typical" Pennsylvania tariff expressly states that the freight charges *include* the wharfage and handling charges of the terminal operator (R. 16). The Pennsylvania General Freight Agent testified that Stevenson & Young's charges are paid out of the "road-haul revenue" received on the export freight in question (R. 289). It would be interesting to learn from Pennsylvania's counsel what he asserts to be the source of the revenue used to pay $1 per ton to Stevenson & Young on commercial freight. Does he disagree with the General Freight Agent? Is he suggesting, for example, that these payments represent a gift to commercial shippers or that the service is being financed by burdening other traffic?

level of export rates to Norfolk in the event that all port services were eliminated is both speculative and immaterial. Even if we assume a negative answer, that still could not justify a present discrimination between shippers.[4]

2. THE SPECIAL NEEDS AND REQUIREMENTS OF THE ARMY AT THE PORT OF EMBARKATION CANNOT JUSTIFY THE CARRIERS' REFUSAL TO ABSORB WHARFAGE AND HANDLING COSTS TO THE EXTENT OF $1 PER TON

The Commission's brief states (pp. 33–34):

> The Commission found that the special requirements of the Army's operation made it necessary that the handling of its freight be done at its own pier facilities, under its control, to suit its own convenience, and that the Army did not wish to use the railroads' pier facilities, thus effectively preventing the railroads from providing the services (R. 22–23). Under such circumstances, there is no obligation upon the railroads to make allowances for unloading and wharfage, for "Whatever transportation service the law requires the carriers to supply, they have the right to furnish. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U S. 199."

We agree with the opening lines in the above-quoted paragraph. The Commission's report finds in substance that there were special requirements, urgencies, and complexities which made it a matter of public interest, if not of actual necessity, that the Army as-

[4] Actually, if it be true that the determining factor in fixing the level of the rates to Norfolk is the necessity of meeting the competition provided by other ports (see R. 16, 220–221), it would seem that a decrease in service would have to be met by a decrease in the rates to Norfolk.

sume supervision or control of the handling of military freight at the port of embarkation. As the report recognizes, there was much at stake and it was important that military personnel be on the scene to assure themselves that detailed instructions relating to the transshipment of war supplies were being carried out with a minimum of error and delay. Thus, the Commission specifically found (R. 20):

> The unloading of cars of commercial freight only required the actual unloading of the cargo and checking thereof on a single sheet of paper, referred to as the "checker's tally sheet." The unloading of cars of Army freight required the handling of the cargo in a complicated manner. For example, at the time of the hearing the Army was receiving at the base about 1,500 cars a month, destined to the many units then maintained at different locations throughout the world. The cargo was the property of the individual segments of the Army, as indicated by the various emblems thereon. The Stevenson company was required to keep an inventory of all cargo for the Army as it was unloaded, so that the Army would know what was available for outbound movement. This required a vast amount of clerical work, superintendence, and administration, in addition to the actual unloading of the freight. Army freight required from 12 to 19 copies of the cargo document, in addition to the checker's tally sheet. These had to be so related as to make up the various lots for outbound movement, and indicate to some extent the vast problem of the Army in coordinating the supplies received in

> the various cars for shipment to its widespread forces.

It also found (R. 22) that the Army had to meet special and pressing time requirements.

Appellees argue that the railroads never undertook to meet such special requirements or to unload under supervision of a shipper. As the argument is stated in the quoted excerpt from the Commission's brief, the railroads were thus "prevented" from providing the service.[5] But apparently mindful that the carriers have never, in any event, physically performed any handling at the Army Base piers and that their unvarying practice has been to absorb the charges of a commercial terminal operator (the Army's lessee or permittee), the brief hastens to quote this Court for the proposition that "[w]hatever transportation service the law requires the carriers to supply, they have the right to furnish." The same statement from the *Atchison* case appears in similar context in the Commission's report (R. 23).

It is the reliance on this proposition (with which proposition we fully agree) that exposes a fundamental fallacy in appellees' case. The instant case, most emphatically, is *not* one involving a "transportation service the law requires the carriers to supply." Loading and unloading and the provision of piers, as appellees themselves state at other points in their briefs (*e. g.*, Commission Br., p. 13; R. R. Br., p. 4), are not within the normal transportation obligation.

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[5] The same argument is developed in the carriers' brief at pages 37–40. It is there stated that the Army rendered carrier performance of the services "impossible" (p. 37) and that the carriers were "unwilling" (p. 39) to meet the Army's requirements.

These services may be provided by shippers or by third parties, as well as by rail carriers, and, indeed, that is frequently done (see *supra*, pp. 4–6). If it is impractical for the carriers to meet the Army's need for these services and it is necessary in the public interest for the Army to supervise or control their performance, the carriers, we submit, are obliged to untie the package, to exclude the wharfage and handling charges which are now "included" (R. 16, 458), to undo the grossly discriminatory effect (as it operates here) of their original effort to reserve a business which was not inherently theirs, and to place the military freight on a parity with the commercial freight handled at the same piers.

The *Atchison* case does not support appellees' position; it undermines it. The opinion, at the outset, holds that refrigeration of cars is a transportation duty imposed upon carriers by the Hepburn Act and that it is the right of carriers to exclude shippers from performing this service because the railroads "cannot be expected to prepare to meet the demand" and then have use of their facilities and services, involving great investments, "depend upon haphazard calls." 232 U. S. at 215.*

* Here, of course, the facilities (in which the Government recently invested an added $3,000,000, R. 51) are those of the shipper, the United States (R. 9). Nor do the railroads own the loading and unloading equipment (which is the property of the United States or of Stevenson & Young, R. 162) or provide the handling crews (Stevenson & Young employees, R. 82, 183). The carriers merely pay the pier operator on a per ton basis. The Commission overlooks these facts when it says that this case also involves the question of exposing the carriers to "haphazard demands" (Br., p. 34, n. 19).

But the *Atchison* opinion does not stop there. It proceeds to consider accessorial services which the carriers are *not* under a statutory duty to perform, observing in this connection that the handling of carload freight is ordinarily performed by shippers (p. 216). The opinion states further that it frequently depends upon individual circumstances and conditions whether it is better practice for shipper or carrier to perform the various accessorial services which lie outside the normal transportation obligation (*ibid.*). It then declares the criteria which should govern in this penumbral area, noting particularly how the rights of carriers and shippers are to be adjusted. It is this portion of the opinion which bears directly upon the appellees' argument that railroad performance has been "prevented," and we quote it at some length (pp. 216–217):

> But loading may involve more than the mere placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks and binders needed to make the transportation safe; or, the freight may be such as to require special covering, packing, icing or heating, in order to preserve the merchandise in condition fit for use at the end of the journey. Who is to furnish these needed facilities, may be quite as uncertain as who is to place the freight on the car, and can only be determined by considering the character of the shipment, the place where the loading begins, and who can most economically perform the service required.

> Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. *The interest of the public is to be considered as well as that of shippers and carriers—their rights in turn having been adjusted by a reduction in the rate, if the loading is done in whole or in part by the shipper; and by an increase in the rate where the loading is done in whole or in part by the carrier. But, by whomsoever done, the loading must be such as to fit the freight for shipment,* * * *. [Emphasis added.]

The teaching of the *Atchison* case is plain. If, as the Commission found, there were sound reasons for the Army to assume control of its own piers and to issue on-the-scene instructions for the handling of the military freight,[7] and if the carriers were "thus prevented" from performing accessorial services lying outside the normal transportation obligation, then the rights of the carrier and shipper are to be adjusted accordingly.[8] Concretely, the carrier must allow the Army the same dollar which it pays the commercial terminal operator at the Base piers for handling the commercial freight. Neither unwillingness nor inability to make the needed performance of these special services entitles the carrier to more revenue for the line-haul carriage of military freight. Yet, the Commission candidly recognizes (Br., p. 32) that if appellees' position is sustained the carriers

[7] See, also, the Commission's brief, pp. 33, 35.

[8] This view finds substantial support in the court of appeals' opinion in the first *Norfolk* case. *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958, at 970, n. 12, 971–972 (C. A. D. C.), certiorari denied, 344 U. S. 893.

are enabled to realize $1 more per ton for the line-haul carriage of military freight than they realize on the line-haul carriage of identical commercial freight moving between the same points.

In sum, if one accepts the Commission's premise that performance was prevented by necessity, its argument nonetheless fails. Moreover, as we were at pains to point out in our opening brief, the notion that railroad "performance" was prevented is a fiction to begin with. Over a period of more than thirty years, the carriers have never physically performed at the Army Base piers. They undertook to absorb, within stated limitations, the charges of the pier operator. This emphasizes that the adjustment requested by the Army's complaint is not only one which will eliminate discrimination, but that it is a painless adjustment without element of surprise, unfairness or burden: it requires the carriers to do no more than make continued payment of the same $1-per-ton previously paid on military freight and still paid on commercial freight.

3. THE RULES AND PRACTICES UPON WHICH THE CARRIERS RELY, WHETHER OR NOT REASONABLE IN OTHER CONTEXTS, ARE UNREASONABLE AND DISCRIMINATORY AS THE CARRIERS WOULD APPLY THEM HERE

Appellees argue that it has been the railroads' general practice to limit the availability of the port services to designated public piers; that the carriers do not undertake to serve at the piers of shippers; and that when the Army elected to reactivate the port of embarkation, to repossess its piers, and to supervise

the handling of its freight it no longer qualified, under the terms of the tariffs, to receive the services.

It is not necessary for us to challenge the public pier-private pier distinction in order to show that unjust discrimination has occurred in this case, for the rationale of the Commission's decisions upholding that distinction has no application here. It may be that shippers generally are not suffering discrimination by virtue of the carrier's port practices at Norfolk. Our concern is that in the particular situation before the Court in this case the Government is suffering a patent discrimination.*

The carriers rely (R. R. Br., pp. 22–23) upon the Commission's decision in *Weyerhaeuser Timber Co.* v. *Pennslyvania R. Co.*, 229 I. C. C. 463 (1938) as correctly stating the public pier-private pier rationale. That opinion declares that it has been the policy of the carriers "to restrict the port practices as much as possible, consistent with adequate service" (p. 473). It points out (*ibid*) that, if the carriers undertook to serve any and all piers, they would have to disperse their operating crews and scatter their traffic, which would be uneconomical and wasteful; that, by the same token, the carriers would have to conform their car deliveries to suit the convenience of the numerous piers owners; and that, in view of the differences between export rates and domestic rates, deliveries to private piers would create "policing" problems.

* The acceptance of the Government's position in this case does not therefore require a general revision in the port practices. Cf. Commissioner's Br., p. 39. And see the court of appeals decision in the earlier *Norfolk* case, 198 F. 2d at 972.

But if, as the Commission's decision in the instant case indicates, the needs of the Nation at this port of embarkation are of a special and complex nature, so that Government supervision is required, and if, as further appears, the carriers are unprepared or unwilling to perform the services without untrammeled control of the operation, it would seem plain that what the carriers are willing and prepared to provide is, by definition, inadequate. In such circumstances a shipper is entitled to perform for himself a non-transportation service of this kind without suffering discrimination as compared to the shipper for whom the service offered by the carriers is adequate. See this Court's *Atchison* decision, discussed *supra*, pages 13–14. As held by the Court of Appeals for the District of Columbia Circuit in the first *Norfolk* case (*United States v. Interstate Commerce Commission*, 198 F. 2d 958), involving the Government's resumption of control of the same piers during World War II, action taken by the Government "in an emergency to assure a smooth flow of war materiel" (p. 970) cannot be likened to "a mere matter of commercial convenience or advantage" (p. 972).[10]

Furthermore, the Army's resumption of control of the Base piers does not compel carriers to serve port facilities at a location other than that which they normally serve. The Army Base piers have been used

[10] We recognize that the Commission again denied reparations in the first *Norfolk* case following remand by the court of appeals. Whether the Commission's decision on remand (*United States* v. *Aberdeen & Rockfish R. R. Co.*, 294 I. C. C. 203) is consistent with the court of appeals' opinion and mandate is a question yet to be resolved.

uninterruptedly by these carriers for more than thirty years. They have been used for the handling of substantial quantities of commercial freight during the period involved in this case. See R. 179. Thus, there is no question of wasteful dispersion of traffic. Indeed, during emergency and war periods, when the port of embarkation is active, traffic is at a high density and the carriers doubtless realize in substantial degree economies of scale and the increased earnings which such economies make possible.

So far as the "policing" of traffic is concerned, it suffices to note that the carriers' tariffs provide that the export rates apply to traffic handled at Army and Navy bases controlled by the Government (R. 21; R. R. Br., p. 27) if it be shown that the freight is actually exported.[11] Thus there is no room for any assertion that the carriers must retain custody of the freight at the Base in order to protect against false claims to the export rate.[12]

It is stated (R. R. Br., p. 29) that the Army has been receiving extra switching or car placement at the Base piers. The Commission found that the

[11] Any question as to whether the Government has provided, or is able to provide, satisfactory proof of exportation in respect of all shipments as to which reparations are claimed (see Commission Br., p. 23, n. 9) would require resolution by the Commission if this Court should reverse the judgment below.

[12] Protection against such false claims is the principal justification for the custody rule, as the *Weyerhaeuser* opinion indicates and as the Pennsylvania General Freight Agent testified (R. 291). The same witness also testified (R. 305): "Now, at the waterfront terminals we don't allow every Tom, Dick and Harry to come in there and congest the place and do his own handling." No one would suggest, however, that the presence of Army personnel at the Army's port of embarkation is unwarranted.

freight cars are brought into certain storage yards within the Base area and held there pending receipt of instructions as to where the cars should be placed (R. 13). It is the Commission's view that the pause or interruption at the storage yards results in a placement, and that the next move constitutes a second placement for which "an additional charge *would be made*" [emphasis added] for "the commercial shipper" (*ibid.*).[13] While the Commission indicates that it regards this second placement as a concession to the Army (*ibid.*), it does not suggest, and appellees disclaim, that the granting of a concession in the form of a second placement "would justify any unlawful discrimination that might exist in other respects". (R. R. Br., p. 29).

That, alone, is a sufficient answer. This is not a case involving a question whether the Army might lawfully be charged an additional sum for switching. The question is whether the Government is suffering discrimination by being required to pay a rate including wharfage and handling—services which it does not in fact receive.

But there is, in fact, a further answer. It appears that the normal practice at the Base piers (at least when volume of traffic was substantial), both before and during the period of Army control, was to hold the cars temporarily in the storage yards before placing them at a point where they might be unloaded.[14]

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[13] The Commission expressly recognizes that any further placements of military freight which are made "are performed by Army engines and crews" (R. 13).

[14] Mr. Frank Jones, yardmaster for the Army and theretofore yardmaster for Stevenson and Young (from 1946 to 1951), testi-

Cars of commercial freight, no less than cars of military freight, have been regularly receiving what the

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fied as to switching and placement practices prior to Army activation of the pier (R. 160):

Q. Mr. Jones, when you were Yardmaster for Stevenson & Young, were any delays ever encountered in moving cars down to the piers for unloading?

A. Well, do you mean no delays at no time in delivering cars?

Q. I mean was the situation much different then than it is now?

A. No, there is no difference. We may have a great volume of business.

Q. And by reason of the greater volume, there might be greater congestion at times?

A. Yes, sir.

Q. But there were some delays at that time, too, weren't there?

A. Well, we are going to have a minimum amount of delays at all times.

Mr. Roy Farrell, General Manager of Stevenson & Young's Norfolk Terminals Division and employed in various capacities at the Army Base piers for over thirty years, testified that the only difference between the placement practices before and after May 1951 was the source of the placement orders (R. 163–164):

Q. Are you familiar with the manner in which export and import freight has been handled at the Maritime Administration Terminal piers both before and since 1 May 1951, the date on which the Army began the port operation?

A. Yes.

Q. Is there any difference in the placing of cars, as called for by the terminal operator, since the Army took possession of the piers from the way this work was performed before Army possession?

A. The Army yardmaster now orders car placements to be performed by the railroads, or places cars of military traffic with Army power. On Army traffic my company is a labor contractor instead of a Terminal Operator. Before the Army activation of the Hampton Roads Port of Embarkation, my company ordered the railroad car placements or placed the cars with its own power on both military and commercial traffic.

Commission's report characterizes as a second placement,[15] and there is no indication in the record that this has ever led to the imposition of an additional switching charge upon any shipper.[16] It is suggestive.

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[15] Yardmaster Jones testified that cars handling commercial freight "are handled in the same manner that we handle our cars. They are dropped in the yards here, and when placing orders are received for them, they are cut out and placed down to the unloading point" (R. 144). In answer to the question, "Have you observed any differences in the yard movement of such cars—I have reference to the commercial cars—either to warehouses or the piers from the manner in which cars loaded with military freight are handled?" he replied "No" (R. 145).

When asked the difference in handling of commercial traffic on the Army Base, Mr. Farrell, General Manager of Stevenson & Young, answered (R. 163): "Placement of cars is ordered by my company on commercial traffic. Placement of cars is ordered by Army on military traffic." Later, Mr. Farrell testified (R. 165):

> Q. When commercial cars arrive at the Army base through Quartermaster junction—when I refer to "commercial cars," I mean cars loaded with commercial freight which your company handles—do those cars move directly to the pier for unloading without stopping?
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> A. I can't conceive of why any but a negligible amount should, because when the cars come in, commercially, we are not ready to unload them. There could be a case where we were waiting for a "hot" car to make up a shipment, something urgent for a ship, you know, and we hear the railroad has it, and we would tell the railroad to push that car right straight down to post number so and so. That is not frequent.
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> Q. What would be the ordinary manner in which a car would be handled when it arrives on the base, a car of commercial traffic?
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> A. Well, it would normally be put in the holding yard, at either one of the piers.

[16] The testimony cited in the railroad's brief at page 29 (R. 229–236, 274–286) relates solely to a spot study of railroad car movements for one week in 1952, and has no relevance to the question of comparable treatment of commercial shipments.

that the Commission's report does not find that commercial shippers *have* paid for a second placement at the Base piers. The only explanation which we are able to suggest for the Commission's statement that a commercial shipper *would* have to pay for such a placement is that the Commission may have been considering the matter of placing freight at a team track or industrial siding, an explanation which finds some support in the Commission's reference, at a later point in its report (R. 24), to *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

In contrast to the situation at an industrial plant, the nature of an operation at a port terminal almost invariably requires that there be more than one placement. No port terminal operation can be so integrated that each railroad car, as it arrives, can be brought directly to the pier apron for loading of cargo on a steamship ready and waiting. When the railroads undertake to perform wharfage and handling at a port terminal, they know and necessarily contemplate that more than one placement may be required. See R. 115, 160, 165–167.[17]

[17] For a fuller discussion of the inapplicability of the industrial spotting cases to port terminals served under shipside rates, see the Government's brief in opposition (pp. 22–26) to the petition filed by the Commission and the carriers in the first *Norfolk* case. Oct. Term, 1952, No. 400.

CONCLUSION

For the reasons stated in our opening brief and in this reply brief, the judgment of the district court should be reversed.

Respectfully submitted.

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OCTOBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956